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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 23.

WILLIAM FOX,
Petitioner,

against

CAPITAL COMPANY, a California corporation,
Respondent.

BRIEF OF RESPONDENT

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
SAMUEL B. STEWART, JR.,
Counsel for Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1936—No. 23

WILLIAM FOX,
Petitioner,

against

CAPITAL COMPANY, a California corporation,
Respondent.

BRIEF OF RESPONDENT

The Order To Be Reviewed

The order of the United States Circuit Court of Appeals for the Second Circuit of March 5, 1936, is to be reviewed by this Court only in so far as it dismissed "the appeal from the order of the United States District Court for the Southern District of New York, entered on February 20, 1936." The review is to be limited "to the question of the jurisdiction of the Circuit Court of Appeals." This Court so directed by its order entered May 18, 1936.

This Court, by an order entered on May 18, 1936, denied petitioner's application in so far as petitioner sought writs of certiorari (1) to review the order of the Circuit Court of Appeals dismissing petitioner's appeal from the order of the District Court entered December 19, 1935, and (2) to review on the merits both orders of the District Court (December 19, 1935, and February 20, 1936) which held petitioner guilty of a civil contempt of court and fixed

his punishment therefor. Therefore, to the extent that petitioner's brief argues upon those matters it relates to matters not now subject to review here and such matters will be disregarded by respondent.

Questions Presented

The sole questions presented are:

(1) Does the imposition by the District Court of costs in an order otherwise interlocutory make that order "final" and therefore appealable to the Circuit Court of Appeals?

(2) Does the presence of a question concerning the jurisdiction of the lower court over the person of the petitioner make an interlocutory order appealable?

Statement

Respondent holds a judgment in the amount of $297,412.91 against William Fox, entered in the United States District Court for the Southern District of New York on July 18, 1935 (R. 7). William Fox has been evading payment of the judgment (R. 36-40). Prior to October 8, 1935, respondent's attorneys were engaged in extensive and diligent efforts to locate and serve petitioner, who was obviously evading service (R. 36-40; 7-11.)[1] Service was effected on petitioner on October 8, 1935, at Frankford Junction, Pennsylvania, concededly within one hundred miles of the court house (R. 2-3; 7). Petitioner at that time was maintaining, and for many years prior thereto

[1]Indeed, service was once before effected on petitioner (at Atlantic City), but was set aside on petitioner's motion on the ground that Atlantic City was more than 100 miles from the court house (R. 36).

had maintained, two residences in the State of New York, one in New York City in the Southern District of New York, and the other at Woodmere, Long Island, in the County of Nassau, Eastern District of New York (R. 9, 36). For a few weeks prior to the date of service petitioner had been sojouring at a hotel in Atlantic City, New Jersey (R. 13, 37, 38). Upon petitioner's defiance of the subpoena, the District Court entered two orders, the first[1] adjudging petitioner in contempt and the second[2] directing him to pay (1) $235,082.03, representing the unpaid balance due upon the judgment and interest, and (2) $10,000 as costs in supplementary proceedings, representing fees and disbursements of respondent's attorneys in their efforts to locate and serve petitioner (R. 27-30; 54-56). As to the $235,082.03, the order permitted the petitioner to purge himself of the contempt by appearing and testifying (R. 56). Appeals from both orders were dismissed by the Circuit Court of Appeals for the Second Circuit (R. 80; 95).

SUMMARY OF ARGUMENT

I. An award of costs incidental to an interlocutory order of the District Court does not make such order final or appealable.

II. The mere fact that a question of jurisdiction of the lower court is involved does not make an interlocutory order appealable.

III. The question whether the District Court had jurisdiction over petitioner when the contempt order was made is not before this Court.

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[1]Entered December 19, 1935; not subject to review under this Court's order of May 18, 1935.

[2]Entered February 20, 1936; jurisdiction of Circuit Court of Appeals to consider appeal from which is subject to review here.

ARGUMENT

POINT I

AN AWARD OF COSTS INCIDENTAL TO AN INTERLOCUTORY ORDER OF THE DISTRICT COURT DOES NOT MAKE SUCH ORDER FINAL OR APPEALABLE.

Petitioner argues in points A, B and E of his brief that since the District Court's order grants him the right to purge himself of the contempt only as to the $235,082.03 and not as to the $10,000 costs imposed by the Court, it is a "final decision" on the matter of costs and reviewable in the Circuit Court of Appeals. Throughout these points petitioner attempts to divert attention from the real nature of this award of costs by referring to it as a "judgment for $10,000", an "order for the immediate payment of $10,000", and an "order for the immediate payment of money".

In the case of *Doyle* v. *London Guarantee & Accident Company, Limited,* 204 U. S. 599 (1907), an almost identical set of facts was presented to this Court and the order was held not appealable. In that case the defendants were directed to produce their books and papers by a certain date, or pay a fine of $250 "and also the costs accruing upon this motion, including the stenographer's charges". As in the instant case, leave was given by the Court to the defendants in the *Doyle* case to purge themselves of their contempt and so relieve themselves of the fine, but no leave to purge was given in so far as costs were awarded, the order expressly providing that:

> "if they produce the cash book alone, they are ordered to pay *no more than* the costs accruing upon

> this motion, including the stenographer's charges on or before January 20th, or in default of such payment to be imprisoned for 60 days." (204 U. S. at p. 602; Italics ours).

This Court's opinion does not indicate the amount of costs that was there involved, nor is there any discussion in the opinion which would indicate that the Court's decision was in the slightest degree dependent upon the amount of costs awarded. Indeed, since the Court there expressly included "the stenographer's charges" it is apparent that the rule of the *Doyle* case was not intended to be limited to cases in which only nominal costs should be allowed, for it is a matter of common knowledge that stenographers' charges in lengthy proceedings frequently run into thousands of dollars. The fact that defendants in the *Doyle* case were ordered imprisoned unless they paid the costs likewise did not make the order appealable. There is no more reason why a similar order should be any more appealable in the present case.

There is no need for petitioner's alleged fear that if an appeal be not now heard by the Circuit Court of Appeals he will rot in jail because of his inability to pay the costs or to obtain a review. If he should be committed to custody pursuant to a contempt order not otherwise reviewable, review of the question of whether the Court had jurisdiction to make the order would always be open by way of application for a writ of habeas corpus. *Ex parte Fiske,* 113 U. S. 713. If an appeal should be heard now and the order affirmed there would be nothing to prevent petitioner from appealing again from a denial of habeas corpus.

If the *Doyle* case should be overruled by this Court the way would be made easy not only for unscrupulous

judgment-debtors but for defendants generally whose sole defense is to delay proceedings until the plaintiff gives up from discouragement and exhaustion. The door would be thrown wide open to dilatory appeals by such parties from every interlocutory order which might be entered upon every matter of pleading, practice or otherwise, however trivial, if only costs be assessed by the District Court against the party seeking such delay.

The costs in the present case are substantial but not excessive. They are considerably less than five per cent. of the amount of the judgment. Yet the statute (New York Civil Practice Act § 803 (1), in effect in the United States District Court for the Southern District of New York under Rule 5 of the Common Law Rules of that Court) authorized costs, in the discretion of the Court, up to five per cent. of the judgment *in addition to* "witnesses' fees and other disbursements, including referee's fees." The disbursements alone in the present case were shown to be in excess of $3,000 at the time of entry of the order awarding costs (R. 47; 49-50). If a judgment-debtor, through evasion and dilatory proceedings, causes heavy expense to a judgment-creditor, justifying a substantial award of costs in connection with an interlocutory order entered in supplementary proceedings, that fact certainly does not require that such judgment-debtor shall be shown special consideration and allowed to prosecute an appeal at a stage of the proceedings when an appeal would not otherwise be allowed. Such a rule could result only in hardship to honest judgment-creditors and plaintiffs while enabling their scheming adversaries to take advantage of their own wrong doing.

There is not one in the dozens of cases cited in petitioner's brief which upholds the appealability of an inter-

locutory order merely because it incidentally (but nevertheless definitely and "finally") awards costs to the prevailing party as an incident to the relief primarily granted. Yet, substantial as the sum of $10,000 is, the award of that sum as costs to the judgment-creditor in this order was patently incidental to the main relief granted, which was an order that a judgment-debtor, whose evasive and dilatory tactics had long thwarted the judgment-creditor and burdened the Court, should now at last testify concerning his assets or pay his adjudged debt of more than $200,000, or, in the event of his refusal to do either, should go to jail until he decided to do one thing or the other.

To allow an appeal from every order awarding costs would without question result in a flood of litigation in the Circuit Courts of Appeals which would seriously impede those Courts in the expeditious handling of appeals involving final determinations of substantial matters upon the merits. This is no doubt the reason why appeals from interlocutory orders generally have not been authorized by statute.

The policy of limiting appeals has long been justified by this Court upon similar reasoning. Very early in the judicial history of this Court the question arose whether this Court had authority to review Circuit Court orders committing witnesses to prison for contempt. In *Ex parte Kearney, 7* Wheat. 38, a petition was presented to the Supreme Court for a writ of habeas corpus to bring up the body of Kearney who was in prison under a commitment of the Circuit Court for an alleged contempt in refusing to answer a question put to him after his objection to it was overruled. The Supreme Court refused the writ on the ground that it had no appellate jurisdiction in criminal

cases. Mr. Justice Story, in delivering the opinion of the Court, said at page 42:

> "* * * undoubtedly the denial of this authority proceeded upon great principles of public policy and convenience. *If every party had a right to bring before this court every case in which judgment had passed against him for a crime or misdemeanor or felony, the course of justice might be materially delayed and obstructed, and in some cases totally frustrated.*" (Italics ours.)

POINT II

THE MERE FACT THAT A QUESTION OF JURISDICTION OF THE LOWER COURT IS INVOLVED DOES NOT MAKE AN INTERLOCUTORY ORDER APPEALABLE.

In points C and D of petitioner's brief an ingenious effort is made to secure a ruling by this Court upon the merits of this controversy. This is simply an attempt to circumvent this Court's orders of May 18, 1936, in which writs of certiorari to review the merits were denied and the review was expressly limited to the question of the jurisdiction of the Circuit Court of Appeals to hear an appeal on the merits.

Disregarding the twelve pages of petitioner's brief devoted to a consideration of the merits (pp. 26-38), it will be found that this argument of petitioner is based primarily upon two cases: *Phillips* v. *Negley,* 117 U. S. 665, and *The Farmers Loan & Trust Co., Petitioner,* 129 U. S. 206 (Petitioner's Brief, pp. 23-25).

Petitioner appears to contend that these cases stand for the proposition that any order not only may but *must* be reviewed on appeal if a question is raised concerning the jurisdiction of the Court below to make the order. These cases do not support that proposition and, indeed, there is no such rule.

It is well settled, for example, that appeals do not lie from United States District Court decisions denying motions to dismiss a proceeding or to quash the service of process for want of jurisdiction over the person of defendant.

Pearson v. *Higgins,* 34 Fed. (2d) 27 (C. C. A., 9th, 1929) Cert. denied, 280 U. S. 593;
Trans-Atlantic Trust Co. v. *Pagenstecher,* 287 Fed. 1019 (App. D. C., 1923);
Mellon v. *Mertz,* 30 Fed. (2d) 311 (App. D. C., 1929);
5 LONGSDORF, CYCLOPEDIA OF FEDERAL PROCEDURE, § 2605;
Cf. *Mann* v. *Gaddie,* 158 Fed. 42 (C. C. A., 5th, 1907).

Longsdorf, in the section cited, says:

> "Mere interlocutory rulings as to process which leave the suit unimpaired and undisposed of are not appealable, such, for example, as an order overruling a motion to quash process or service thereof."

Similarly, Chief Justice Martin, in the *Mellon* case, said at page 312:

> "the order overruling the motion to dismiss the bill of complaint was interlocutory only, and was not appealable. *Metzer* v. *Kelly,* 34 App. D. C. 548.

> Nor was the order overruling the motion to quash appealable. * * *"

While the *Pearson* case arose in bankruptcy and, therefore, presented the question in slightly different form, the Court in dismissing an appeal from an order of the District Court denying review of the determination by the Referee in Bankruptcy that the bankruptcy court had jurisdiction in a summary proceeding to hear the issue of title and possession of a boat, commented appropriately at page 28:

> "In an ordinary case at law or in equity, an order overruling an objection to the court's jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding. * * * Appellate courts do not sit to anticipate possible grievances or to try out controversies in piece-meal."

Since petitioner's argument that the District Court did not have jurisdiction is based upon an attempted analogy between the manner in which a summons to institute an action must be served and the manner in which a subpoena in supplementary proceedings must be served, these authorities are extremely pertinent in the present case.

It is, of course, fundamental that if an order is appealable, whether because it is a "final order" or because an appeal is expressly authorized by statute, one of the questions which will be considered on the appeal is the question whether the Court below had jurisdiction to make the order appealed from.

Cases such as *Phillips* v. *Negley*[1] and *The Farmers Loan & Trust Co., Petitioner,*[2] merely illustrate this fundamental principle. Both involved "final orders". In the *Phillips* case the lower court had granted a motion to vacate a

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[1]117 U. S. 665.
[2]129 U. S. 206.

judgment several years after the entry of the order appealed from. This was unquestionably a "final order". The Court makes the point that if the judgment had been vacated at the same term at which it was entered, the order would not have been "final" or appealable, but that having been made at a subsequent term, it was both "final" and appealable.

The distinction is this: Where a motion to vacate a judgment is made at the term at which the judgment was entered, it is a part of the same proceeding in which the judgment was entered, which proceeding cannot then be terminated until after the new trial; the order vacating the judgment is, therefore, necessarily interlocutory. Where no motion is made at the same term, however, the judgment becomes final, and any motion subsequently made necessarily partakes of the nature of a new proceeding which, in turn, is terminated by the order granting or denying the motion. This distinction was drawn by this Court in the case of *Hume* v. *Bowie*, 148 U. S. 245 (1893). There the Court had before it a motion to dismiss a writ of error for want of jurisdiction upon the ground that the order brought before the Court by the writ was not "final". The order in question had been entered after the legal expiration of the term at which the judgment was entered. The term, however, had been extended by order of the Court until after the date when the order was entered. This Court dismissed the writ of error, distinguishing the *Phillips* case in the following language at page 255:

> "The distinction between *Phillips* v. *Negley*, 117 U. S. 665, and this case is, that there a verdict and judgment had been taken against the defendant and no motion was made or proceeding had at that term for the purpose and with the view of setting aside

> the judgment. The litigation was at an end upon the adjournment of the term and the successful party discharged from further attendance."

The case of *S. M. Hamilton Coal Co.* v. *Watts,* 232 Fed. 832 (C. C. A. 2d, 1916), cited by petitioner at page 38 of his brief involved a situation identical with that involved in the *Phillips* case. To the same effect also is the case of *City of Manning* v. *German Ins. Co.,* 107 Fed. 52 (C. C. A. 8th, 1901), cited by petitioner on page 39 of his brief.

Similarly in *The Farmers Loan & Trust Co.* case[1] the first question to which this Court addressed itself in its opinion was the question whether the order appealed from had that degree of "finality" requisite to appealability. After stating its views as to the nature of the rights determined by the order of the Court below and the impossibility of obtaining a review of such rights except upon the appeal there taken, the Court said at page 214:

> "If this view of the subject be correct, of which we entertain no doubt, *the order is a final one.*"

Then, having already determined that the order was final and appealable, the Court proceeded to consider the jurisdictional question.

The cases of *Motion Picture Patents Co.* v. *Steiner et al.,* 201 Fed. 63 (C. C. A. 2nd, 1912) and *Newton* v. *Consolidated Gas Co.,* 265 U. S. 78 (1923), cited by petitioner (Brief, pp. 38-39), are likewise distinguishable from the present case in that both involve appeals from final judgments or decrees. While the power of the lower court in each case to award a particular kind of costs was in ques-

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[1]129 U. S. 206.

tion, there is nothing in either case to indicate that such awards would have been subject to review before final decree or otherwise than as incidental to final decree.

As indicated in Point I, it is clear that a civil contempt order does not become "final" for the purpose of determining appealability until the denial of an application for a writ of habeas corpus. In addition to the case of *Doyle* v. *London Guarantee & Accident Co. Ltd.*, 204 U. S. 599 (1907), cited in Point I, the same principles as to the appealability of contempt orders were enunciated by this Court in *Matter of Christensen Engineering Company*, 194 U. S. 458 (1904). In that case the Court regarded the fact that the fine was payable one-half to the United States as establishing the character of the proceeding as criminal rather than civil, but nevertheless said, after discussion of a group of earlier cases:

> "These authorities show that when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree." (pp. 460-461.)

Cases in the New York State courts have likewise uniformly held contempt orders to be unappealable under a New York statute (Civil Practice Act § 588 and its predecessor) similar in language to the Federal statute (28 U. S. C. A. § 225) defining the jurisdiction of the United States Circuit Court of Appeals:

> *Steinman* v. *Conlon*, 208 N. Y. 198 (1913);
> *Hand* v. *Ortschreib Building Corporation*, 254 N. Y. 15 (1930).

Both of these decisions by the highest court of the State of New York are directly in point as both involved contempts in supplementary proceedings.

The mere fact that the Circuit Court of Appeals for the Second Circuit appears once to have reviewed a contempt order in a case* in which the lack of jurisdiction to consider the appeal was not pointed out to the Court by counsel and was not mentioned in the Court's opinion (Petitioner's Brief, Point D) is certainly entitled to very little weight in opposition to the contrary holding of this Court in *Doyle* and *Christensen* cases, which were followed by this same Circuit Court of Appeals in this very case when counsel for this respondent brought them to the Court's attention.

POINT III

THE QUESTION WHETHER THE DISTRICT COURT HAD JURISDICTION OVER PETITIONER WHEN THE CONTEMPT ORDER WAS MADE IS NOT BEFORE THIS COURT.

In view of the clear language of this Court's order of May 18, 1935, limiting the review herein to the question of jurisdiction of the Circuit Court of Appeals to hear an appeal, the only excuse which Petitioner could have for using more than one-fourth of his brief in this Court to argue the merits of his contention that the District Court had no jurisdiction to punish him for contempt, is a contention that interlocutory orders involving jurisdictional questions are appealable if the lower court has *mistakenly* determined that it had jurisdiction but are not appealable

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**McCall Co.* v. *Bladworth*, 290 Fed. 365 (C. C. A. 2d, 1923).

if that court's determination of its own jurisdiction is correct. In other words, Petitioner is forced into the position of contending that an appeal will be heard in such cases only if the appellate court is going to reverse, or, in effect, that the merits of the appeal must be determined upon a motion to dismiss the appeal. Neither reason nor precedent requires such an illogical ruling.

If the mere existence of a contention by an appellant that the lower court has exceeded its jurisdiction makes an interlocutory order appealable, then the order in this case was appealable and Respondent will make a proper answer on the merits in the Circuit Court of Appeals as it did in the District Court. If the mere existence of such a contention is not sufficient, as we submit (and the authorities cited in Point II hold) it is not, to make an interlocutory order appealable, this Court should affirm the decision of the Circuit Court of Appeals dismissing the appeal in this case, and no consideration of the merits of the District Court's order will be necessary unless and until it shall be raised in the usual and ordinary way upon an application by the Petitioner for a writ of habeas corpus.

CONCLUSION

It is therefore respectfully submitted that the order of the United States Circuit Court of Appeals for the Second Circuit, dated March 5, 1936, was correct and should be affirmed.

Respectfully submitted,

FREDERICK H. WOOD,
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SAMUEL B. STEWART, JR.,
Counsel for Respondent.

APPENDIX

Common Law Rule 5 of the United States District Court for the Southern District of New York provides:

> "In Common Law causes the parties shall be entitled to the same rights and remedies as respects attachments against the property of the defendant, and as respects, proceedings supplementary to execution, as are now or may be hereafter provided by the laws of the State of New York, which laws (in respect of Common Law causes) are hereby adopted."

Subdivision 1 of Section 803 of the New York Civil Practice Act provides:

> "§ 803. *Costs.* 1. The court or judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witnesses' fees and other disbursements, including referee's fees, and of a sum in addition thereto not exceeding five per centum of the judgment but where such additional sum is under fifty dollars, the court may allow a sum not to exceed fifty dollars. The court may direct the payment thereof out of any money which has come or may come into the hands of the receiver or sheriff; or, within a time specified in the order, by the judgment debtor."

28 U. S. C. A. § 225 (Jud. Code § 128) in so far as relevant to this proceeding provides:

> "(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Section 588 of the New York Civil Practice Act, in so far as relevant to this proceeding, provides:

"§ 588. *Jurisdiction of the court of appeals in civil actions and proceedings.* Appeals may be taken to the court of appeals in civil cases and proceedings as follows:

"1. As of right from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding * * *."